SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 838

NELLIE C. BOSTWICK, ET AL.,

Petitioners,

vs.

BALDWIN DRAINAGE DISTRICT, ET AL.,

Respondents

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I

Opinion Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit filed November 29, 1945, appears (Tr. Vol. II, p. 66), presented with Petition for Certiorari, at pages 69 to 73. The said opinion has now been reported as *Nellie C. Bostwick, et al.,* v. *Baldwin Drainage District, et al.,* 152 Fed. 2d 1. Petition for Rehearing was filed in the Fifth Circuit Court of Appeals on December 15, 1945, and denied January 7, 1946, all as shown by Volume II of the Transcript, page 81.

II

Jurisdiction

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction has been previously set out in the petition for writ of certiorari separately filed. Briefly Section 240 (a) Judicial Code, now 28 U. S. C. A., Section 347 (a) is the basis for said petition for writ of certiorari.

III

Statement of the Matters Involved

The aforesaid petition for writ of certiorari, pages 1 to 5, presents a "summary statement of matters involved" consisting for the most part in a history of this case including the substance of the decision of the courts below. Supplementing that statement the following matters may give a better understanding of the case:

1. The amended answer of petitioners (Vol. II, pp. 33 to 45) by Section I thereof (p. 34) reaverred all matters set up in the original answer showing derivation of title. Subsequent sections of the amended answer adopted and reaverred certain sections only of the original answer and then supplemented the averments of such sections of the original answer so adopted. By that means much of the original answer was eliminated, especially those parts attacking the corporate existence of the drainage district. Thus, as the record now stands, the petitioners are making no contest upon the corporate existence of the drainage district, and it is conceded, as held by the Supreme Court of Florida in a quo warranto case, namely: *State ex rel. Watson* v. *Covington,* 3 So. 2d, 521, that the drainage district had,

"at least a de facto existence."

The amended answer of petitioners bases its attack upon what occurred *subsequent* to the organization of the district and *subsequent* to the original confirmation of benefits reported by the commissioners. The matters chiefly complained of in the amended answer were not and could not have been contemplated or anticipated while the district was in process of formation or when the reported assessment of benefits was pending for confirmation as occurred on October 4, 1916.

2. The amended answer, as appears by Sections II, III, IV, VI, and VIII specifically (Vol. II, 35-36, 38, 42, 44) invoked the protection of the 14th Amendment as to those matters which occurred after October 4, 1916, and which operated to take petitioners' properties without due process of law and without any compensation in the form of benefits or otherwise.

3. The decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case, 18 So. 2d, text 794, recited thirteen attacks made by the Plaintiffs, in that case, upon the *corporate existence* of the drainage district and upon *original* assessments of benefits as *originally* confirmed October 4, 1916. It will be noted that no mention was made of *subsequent* abandonments of drainage improvements or the effect thereof. No mention was made of *subsequent* radical changes in the plan of reclamation without any new petition to the court, without new assessments of benefits, without new notices to property owners, without any new confirmation by the Court, all as required by what is now Sections 298.07 and 298.27 Florida Statutes 1941. Neither was any mention made in that statement of thirteen points, or any other place in the majority opinion, of any claim made under the 14th Amendment or of any

alleged violation thereof. It is clear, therefore, that when the majority opinion concluded, 18 So. 2d, text 796, that,

> "The bill in this case * * * clearly establishes * * * acquiescence on the part of those who could have protested",

the court had reference to the aforesaid thirteen points and did not deal with the happenings shown by the record in the case at bar *subsequent* to the original confirmation of the reported assessment of benefits nor did the court attempt to decide whether such *subsequent* happenings violated due process of law or took petitioners' property without just compensation or otherwise. When thus properly analyzed the decision in the *Macclenny Turpentine Company* case in no proper sense precluded a consideration of the merits of the contentions set up in petitioners' answers stricken by the courts below. The amended answer of petitioners and the adopted parts of the original answer of petitioners presented an entirely new case, between new parties, as to new lands or the awards made for those lands and the case of petitioners was based upon Federal Law and the 14th Amendment. This was especially so as regards the State law "as administered." *Myles Salt Co.* v. *Board of Commissioners, etc.*, 239 U. S. 478, 484, 60 L. Ed. 392, 396.

4. The soundness of the foregoing conclusions is shown by considering in some detail the case and claims of the McDermott heirs, petitioners here, as set up in the original answer (Vol. I, pp. 86-87). Their parcel No. 28 consisted of four 10 acre tracts or lots 3, 4, 5, and 6 in the northeast corner of Section 26, appearing on the map "Exhibit A" page 231, Vol. I. The plan of that subdivision was to treat the northeast corner of a section as block 1, the northwest corner as block 2, the southwest corner as block 3, and the

southeast corner as block 4. By reference to "Exhibit A" to the answer of the drainage district (Vol. I, p. 69) it will be found that items five to eight on that page represent the McDermotts' lots. From that page it appears that the McDermotts or their father paid drainage taxes up to 1933, but that $34.07 was claimed by the district as drainage taxes alleged to have accrued against each 10 acre tract for the years 1933 to 1941 inclusive. The same page shows the amount claimed for installment taxes, and the amount claimed for maintenance taxes and also interest against each of the four 10 acre lots. The original McDermott answer (Vol. I, pp. 86-87) shows that the father, P. F. McDermott, acquired title in 1910, some six years before the drainage district was organized; also that said McDermott was and his heirs are residents of California from the time of purchase to the time of taking and that they had no knowledge of any proceeding with respect to the Baldwin Drainage District either as to organization, assessment of benefits, the abandonments, the changes in plan of reclamation or otherwise. That the only knowledge they had was reports by the county tax collector that drainage taxes were due along with state and county taxes. Being such a long way off and not desiring to incur expenses they paid drainage taxes for many years without inquiry as to their validity. It is then specifically alleged in their original answer that their lands,

> "Were never benefitted by any of the drainage works and improvements constructed anywhere in said District, either for original construction or for pretended maintenance purposes."

All of the facts above mentioned were admitted by the motion to strike filed by the drainage district (Vol. I, p. 257). What the McDermotts paid in drainage taxes was

an "unjust enrichment" of the drainage district. *District of Columbia* v. *Thompson*, 281 U. S. 25, 74 L. Ed. 676. *Smith* v. *Winter Haven*, (Fla.) 18 So. 2d, 4.

5. Section IV of the amended answer (Vol. II, p. 39) adopts and reavers Section X of the original answer (Vol. I, pp. 134 to 141) and then adds:

> "(a) There was no original drainage construction ever put into effect with respect to the lands of these defendants severally."
>
> "(b) Many areas, including the lands of defendants severally were wholly abandoned and this particularly applies to the lands in the sourthern part of the Cecil Field area."
>
> "(c) Many areas including lands of these defendants were annually damaged by flooding and were never benefited. This particularly applies to the lands in the southern part of the Cecil Field area including parcel 23 belonging to the defendant Nellie C. Bostwick and parcel 28 belonging to the McDermott heirs."
>
> "(d) There was never any pretense of any maintainance whatsoever in any part of the district. That what taxes were collected for maintenance purposes during the period of receivership from 1924 to 1934 were diverted to the payment of attorney's fees, Court costs and other expenses incurred in and about certain drainage tax foreclosure suits."

All these averments and others contained in the amended answer were admitted by the drainage district.

Substantially the same showing was made by Mrs. Bostwick. Her title is set up (Vol. I, p. 83-84) and was based upon a Master's Deed of February 1925 foreclosing a mortgage given in July 1919 before anyone knew that the drainage district would wholly abandon that entire area and would later become insolvent and wholly unable to make any improvements in that area or furnish any main-

tenance. Mrs. Bostwick's forty acre tracts, making up parcel No. 23, in the Cecil Field area clearly appear on the map (Vol. I, p. 231). Her property in the southeast quarter of Section 23 joined the north end of the McDermott lots in the northeast corner of Section 26. Her parcel No. 23 is also identified as the forty acre parcels in "Exhibit A" to the answer of the drainage district (Vol. I, pp. 68, 71 and 72). From those pages it also appears that the drainage district claimed taxes against Mrs. Bostwick's lands from 1919 to 1941 for installment taxes, and for maintenance taxes, aggregating from $20.00 to $25.00 per acre. The jury awarded $5.00 per acre for the same land (Vol. I, p. 273). Hence the order of distribution (Vol. II, p. 50) gave all the awards to the drainage district, save what had been paid for state and county taxes. All of the averments of the amended answer, last above quoted, (Vol. II, p. 39) apply to Mrs. Bostwick's parcel No. 23.

6. Substantially the same set of facts applies to the parcels of Jacksonville Heights Improvement Company involved in this case, namely parcels 14, 21, 22, 25, 36 and 37. It appears from the government's petition (Vol. I, pp. 29, 34, 35, 38, and 45) and from the map "Exhibit A" (Vol. I, p. 231) that those 10 acre parcels are located in the southeast corner of Section 22, the west edge of the southwest quarter of Section 23, the southwest corner of Section 24, the northeast corner of Section 26 and the northeast corner of Section 27.

7. The defenses or attacks upon the drainage taxes levied from 1919 to 1941 inclusive for installment taxes and from 1924 to 1941 for maintenance taxes, may be briefly stated as follows:

(1) There was complete abandonment of all drainage improvements that could have benefitted petition-

ers lands—complete failure of consideration—and this was followed by complete insolvency of the drainage district rendering it unable to ever supply any consideration for the taxes levied. This occurred *subsequent* to the original report of assessment of benefits and *subsequent* to the original confirmation of benefits based upon the original plan of reclamation.

(2) Subsequent to the confirmation of original assessments radical changes were made in the plans for reclamation of areas not completely abandoned. A few of the parcels claimed by Jacksonville Heights Improvement Company were affected by such changes. Not so as to Mrs. Bostwick and the McDermotts, because the areas of their lands were completely abandoned. As to the areas affected by the radical changes the supervisors adopted new plans and new contracts for new canals, smaller canals, in new locations but there was no new application to the Court for authority to make such changes, no reassessment of benefits by commissioners, no new report by commissioners, no notices to property owners, as required by the statute, or as required by the 14th Amendment and no new confirmation by the Court. Nevertheless the supervisors continued to use the original reported assessment of benefits as a basis for levying pretended installment taxes and maintenance taxes.

(3) After the extensive abandonments aggregating about one-fourth (¼th) of the whole area of the district and after the radical changes, approved and put in force by the supervisors, for the remaining areas, the original assessment of benefits became *functus officio* and in any case became wholly arbitrary and capricious, as applied to the new status of abandoned areas and as applied to the new status of areas affected by the radical changes, all contrary to the due process and equal protection clauses of the 14th Amendment.

(4) As to maintenances taxes there was:

(a) No original construction—nothing to maintain—in the areas of petitioners' lands.

(b) No maintenance whatsoever in any part of the district.

(c) Maintenance levies were only pretended and began after the drainage district was insolvent and in the hands of a receiver. There was not a shadow of consideration for any of the maintenance taxes levied, yet it appears, by "Exhibit A" to the District's answer (Vol. I, p. 68 to 72) that about one-sixth (1/6th) of the taxes claimed against all lands, including the McDermott parcel, were claimed for maintenance taxes.

Additional facts will be discussed in the argument supporting the several assignment of errors.

IV

Assignment of Errors

1. *The District Court and the Court of Appeals erred in holding in effect that* Erie R. Co. *v.* Tompkins *was applicable in this case and that they were bound by the decision of the Supreme Court of Florida in the case of* Baldwin Drainage District *v.* Macclenny Turpentine Company, *18 So. 2d 792.*

2. *The courts below severally erred in striking and holding for naught all those parts of the original answer and amended answer of petitioners which set up complete failure of the drainage district to make any drainage improvements in the areas of petitioners' lands and the subsequent insolvency and inability of the district to ever furnish any consideration for the taxes levied against petitioners' lands. Such holdings were neither "just and equitable" nor consistent with the 14th Amendment.*

3. *The courts below severally erred in striking and holding for naught all those parts of the original answer and the amended answer of petitioners which set up sundry abandonments and radical changes in the plan of reclamation without any compliance with what are now Sections 298.07 and 298.27 Florida Statutes 1941, and without any compliance with due process requirements, followed by a continued use of the original assessment of benefits as a basis for levying installment and maintenance taxes.*

4. *The courts below severally erred in striking all those parts of petitioners' answer which set up the arbitrary and capricious character of the original assessments of benefits used as a basis for levying drainage taxes against lands in abandoned areas and as basis for other areas affected by radical and unauthorized changes in the plan of reclamation.*

5. *The courts below severally erred in striking and holding for naught all of those parts of the original answer and the amended answer of petitioners which set up the levying of pretended maintenance taxes from 1924 to 1941 inclusive, on lands in abandoned areas where there was nothing to maintain and on other areas where there was no maintenance and during a period when the district was wholly insolvent and wholly unable to furnish any consideration for such levies.*

6. *The Court of Appeals erred in its application of the doctrine of estoppel to the facts alleged in petitioners' answers and admitted by the District's motion to strike.*

The first assignment of error is jurisdictional in character. The other five assignments of error go to the merits of petitioners' case.

V

Argument

Error No. 1: *The District Court and the Court of Appeals erred in holding in effect that* Erie R. Co. *v.* Tompkins *was applicable in this case and that they were bound by the decision of the Supreme Court of Florida in the case of* Baldwin Drainage District *v.* Macclenny Turpentine Company, *18 So. 2d 792.*

This proposition was emphasized in the "Questions Presented" set forth in the petition for certiorari in support of which this brief is filed. On that account we believe it is unnecessary, in support of Error No. 1, to do more than restate some of the arguments and cite some of the authorities already set forth in the petition for certiorari.

The petitioners contend that the last clause of 40 U. S. C. A., Section 258 (a), vested in Federal courts an independent responsibility to determine what is "just and equitable" between adverse claimants in a condemnation suit brought under that Section, as in the case at bar, and in consequence that a Federal court when determining such adverse claims is not bound by the rule laid down in *Erie R. Co.* v. *Tompkins.* The order of the District Court (Vol. II, p. 46) striking the answers of the petitioners and holding the same for naught shows that the District Court deemed itself bound by the decision of the Florida Supreme Court in the *Macclenny Turpentine Company* case, 18 So. 2d 792. The opinion of the Fifth Circuit Court of Appeals (Vol. II, p. 66), 152 Fed. 2d 1, shows the same thing in so holding. The decisions of the courts below are in apparent conflict with this court's decision in the case of *U. S.* v. *Miller,* 317 U. S. 369, 382, and in conflict with the decision of the Second Circuit Court of Appeals in *U. S.* v. *Certain Lands,* 129 Fed. 2d 577, fourth headnote and supporting text.

This Court has lately rendered a number of decisions involving other Federal Statutes, containing analogous provisions, where it was held that the doctrine of *Erie R. Co.* v. *Tompkins* did not apply, and it seems to us that such holdings, with respect to analogous statutes, are equally applicable to the last clause of 40 U. S. C. A., Section 258 (a). That was the view taken by the Second Circuit Court of Appeals in *U. S.* v. *Certain Lands*, 129 Fed. 2d 577; because in that case the Second Circuit Court of Appeals cited, as authority for its conclusions, the decision of this Court in *American Surety Co.* v. *Bethlehem National Bank*, 314 U. S. 314, which construed and applied a clause in the National Banking Act directing a "just and equitable distribution" of an insolvent bank's assets. A still later decision of this Court, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 87 L. Ed. 838, again construing the National Banking Act, seems to confirm the conclusion reached by the Second Circuit Court of Appeals in the case above cited. In cases involving the amendments to the Bankruptcy Act for the reorganization of public service corporations or for a composition of municipal indebtedness requiring that the plan of reorganization or the plan of composition be "fair and equitable", it has also been held that the doctrine of *Erie R. Co.* v. *Tompkins* is not applicable and that the Federal courts have an independent responsibility to apply well settled equitable doctrines evolved by the Federal Courts, *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 93-96; *Kelly* v. *Everglades Drainage District*, 319 U. S. 415. In the *Prudence Realization Corp.* case 316 U. S. 95, the court laid down this rule,

> "In the interpretation and application of federal statutes, federal not local law applies."

Like decisions have recently been rendered involving applications of the patent law. See *Solar Electric Co.* v. *Jefferson*, 317 U. S. 173.

It may well be that a Federal Court when sitting to determine adverse claims in a condemnation suit would follow decisions of the State court for an interpretation of a local statute but would nevertheless apply general equitable rules, evolved by Federal courts, in determining whether the application or administration of the local statute was consistent with the Federal Law such as the "just and equitable" clause of 40 U. S. C. A., Section 258 (a), or consistent with the requirements of the 14th Amendment. For instance in *State ex rel. Watson* v. *Covington*, 3 So. 2d, 521, the Florida Supreme Court held that the Baldwin Drainage District had,

> "at least a de facto existence".

Meaning that the petition for incorporating the district and the published notice and the decree of incorporation were sufficient under the general drainage law to bring about that result. Undoubtedly that conclusion would be accepted by a Federal court in passing upon the adverse claims involved in this case. We have assumed that it would be so as we pointed out on the second page of this brief. The petitioners, however, contend that when you come to know how the drainage law was *administered and applied* by the supervisors and others having control of the affairs of the district, that is quite a different matter. We think this conclusion is well supported by the decision of this Court in *Myles Salt Co.* v. *Board of Commissioners, etc.*, 239 U. S. 478, 60 L. Ed. 392, cited page 4 of this brief.

It was further pointed out in the petition for writ of certiorari, particularly under "Questions Presented" No. II, that this case involves an attack upon the administration

of the Florida Drainage Law based upon alleged violations of the due process clause and equal protection clause of the 14th Amendment. Thus the attack in that behalf is precisely of the same character as that involved in the *Myles Salt Company* case — *supra.* Moreover,

> "A statute valid as to one set of facts may be invalid as to another."

N. C. & St. L. R. Co. v. *Walters,* 294 U. S. 405; see also *Georgia R. & Electric Co.* v. *Decatur,* 295 U. S. 165, 79 L. Ed. 1365, 1st and 3rd headnotes. Therefore according to many decisions of this Court the rule of *Erie R. Co.* v. *Tompkins* could not apply when Federal courts are considering and passing upon such Federal questions based upon the 14th Amendment. In 54 Am. Jur., Subject "United States Courts", page 974, we find:

> "The rule laid down in that case, (Erie R. Co. v. Tompkins) does not extend to matters governed by Federal Constitution, by treaties of the United States, or by Acts of Congress."

Several decisions of this court are cited in Note 6 supporting this text.

In the petition for writ of certiorari we have urged that it is a matter of great public importance to have an authoritative decision from this Court clearly defining the jurisdiction and authority of lower Federal courts in administering the last clause of 40 U. S. C. A., Section 258 (a). The courts below have, as we believe, gone entirely too far in undertaking to follow a State court decision and that is one of the primary reasons why we believe writ of certiorari should be granted in this case. Another basic reason for granting the writ of certiorari is the apparent conflict between the decisions of the courts below and the decision of the Second Circuit Court of Appeals in *U. S.* v. *Certain*

Lands, 129 Fed. 2d 577. Another conflict seems to exist between the courts below and the decision of the Fourth Circuit Court of Appeals in the case of *Purcell* v. *Summers,* 145 Fed. 2d 979. See also *Richardson* v. *Commissioner,* 126 F. (2d) 562. Conflicting decisions are annotated 140 A. L. R. beginning page 717.

Error No. 2: *The courts below severally erred in striking and holding for naught all those parts of the original answer and amended answer of petitioners which set up complete failure of the drainage district to make any drainage improvements in the areas of petitioners lands and the subsequent insolvency and inability of the district to ever furnish any consideration for the taxes levied against petitioners lands.. Such holdings were neither "just and equitable" nor consistent with the 14th Amendment.*

..This matter of abandonment is fully set forth in the original and amended answers of petitioners. The amended answer adopts and reavers Sections VII, X, XI, and XII of the original answer.

..We have heretofore located the McDermott lots in the northeast corner of Section 26 on the plat (Vol. I, p. 231), also Mrs. Bostwick's parcel no. 23 consisting of the 40 acre tracts on the same plat in Sections 23, 25, and 27. It will be seen from the plat that Sal Taylor Creek crosses two of her 40 acre tracts in Section 27. Jacksonville Heights Improvement Company parcel no. 25 is a 10 acre piece in the southwest corner of Section 24, and Jacksonville Heights Improvement Company parcel no. 26 is a 10 acre piece in the northeast corner of Section 26. These two parcels lie between two of the 40 acre tracts belonging to Mrs. Bostwick. All of these parcels, the McDermotts, Mrs. Bostwicks and Jacksonville Heights Improvement Company, lie in an abandoned area. The same is true of all other parcels along the course of Sal Taylor Creek where it crosses Sections 25, 26 and 27.

In Section VII of the original answer (Vol. I, p. 123-124) it is alleged:

> "That the original plan of reclamation proposed to clear and grub a creek that ran north and south through the east half of Section 23 and the east half of Section 26 to join Sal Taylor Creek. That creek was never cleared and grubbed, * * * the whole of Section 23, the east half of 22 and the whole of 27 and the whole of 26 received no drainage whatsoever and no benefit whatsoever and yet they were arbitrarily assessed at not less than $30 per acre ranging up to $40 per acre."

These allegations relate to the abandoned areas above described. Again in Section X of the original answer (Vol. I, pp. 136-137) it is alleged:

> "That the map or plan of drainage called for the clearing and grubbing of floodways, one along Rowell Creek on the west edge of Sections 22 and 27 involved in this proceeding; another along Sal Taylor Creek in the southern part of Sections 27, 26 and 25 involved in this proceeding; another beginning in Section 23, thence south through that section and through a part of Section 26, whereas such floodways were never cleared and grubbed, much less were they ever maintained. On the contrary the greater volumes of water discharged into those creeks as aforesaid flooded and damaged those areas and made them less valuable than they were before any drainage works were constructed in the sections of land lying to the north thereof."

By Section XI of the original answer (Vol. I, p. 145) it is shown that in April 1918 the supervisors entered into a new construction contract, exemplified by "Exhibit B" to the original answer, adopting revised plans or maps for future construction work. The contract and revised plans are thus referred to on that page:

> "That by resolution of the supervisors passed February 13th, 1918, said revised maps or plans of drainage

> works were adopted and approved and later on to wit April 2nd, 1918, were formally incorporated in and used as the basis of said new contract. That said revised plans are hereto attached and made a part hereof marked Exhibits "C", "D", and "E".

Section XII of the original answer (Vol. I, p. 155-159) further explains what the abandonments amounted to in various parts of the district and the effect thereof. The showing made by the original answer as to abandonment is reinforced by the averments of Section VI of the amended answer (Vol. II, p. 40-43). At page 41 of that volume it is among other things stated:

> "That under said changed plans of reclamation practically the entire SW ½ of Township 3 South Range 24 East including about the SW ½ of Cecil Field was left entirely without any drainage improvements whatever and this was to follow pursuant to the adoption of the map, Exhibit E to this answer which occurred February 13, 1918."

The foregoing extracts from the original and amended answers of petitioners make it perfectly clear that there was complete abandonment of the lands of the McDermotts, Mrs. Bostwick and Jacksonville Heights Improvement Company in the southern part of the Cecil Field area. Those lands were not only abandoned as far as any benefits were concerned, but in addition they were actually damaged annually by flood waters discharged into the northern branches of the streams that flow through the southern part of that area.

The matter of abandonment is further demonstrated by "Exhibit G" to the original answer (Vol. I, p. 251-257). That exhibit was a copy of a report made by the engineer Mr. Simons, employed by the supervisors in 1928 to make a complete survey of the then existing status of the drainage canals and works within the district. The location of

canals and flood-ways, as originally proposed, in the southern township of the district was exemplified by the dotted lines on the map "Exhibit E" (Vol. I, p. 249). The location of canals and flood-ways according to the revised plan of 1917 is shown by the solid lines on the same map. The data on the margin of that map shows that the proposed cubic footage to be excavated was reduced nearly one-half. But when Mr. Simons made his report in 1928 he showed very much more the fact of abandonment in that township particularly in the southern part of what is now the Cecil Field area. In his report, "Exhibit G", he had the following to say with regard to the "E", "F" and "G" systems of drainage in the southern township:

> "The "E", "F" and "G" systems drain about 27 square miles into tributaries of the Yellow Water and Sal Taylor Creeks, which flow into Black Creek, thence into the St. Johns River. These systems were designed with good grades in most cases, yet they terminate in swamps or small runs to overflow through these runs and swamp."

By reference to "Exhibit D" to the original answer it will be seen that those three systems mentioned by Mr. Simons carried into the township north of the southern township and supposedly drained about five sections thereof. Taking those five sections from the 27, mentioned by him, leaves only about 22 sections of the southern township drained at all and 14 sections wholly without drainage. Furthermore he definitely reported that the ditches as dug in the northern part of the southern township terminated in:

> "Swamps or small runs to overflow through these runs and swamps."

All of which means that the ditches dug in Sections 11, 12, 13 and 14 of the southern township "Exhibit E" terminated in the northwest quarter of Section 24 and then flooded the

swamp shown as Sal Taylor Creek on the map at page 231 of the original transcript. Furthermore the extracts, above quoted from the original and amended answers (all admitted by the motion of the district), show that the proposed floodways in the area of petitioners lands were never cleared and grubbed but were left in their original condition to be flooded by excess water discharged into the northern ends of the creeks and branches as reported by Mr. Simons. These facts of abandonment took place *after* the district was organized and after the original assessment of benefits had been confirmed by the Court Order of October 4, 1916.

In addition to the facts of abandonment the amended answer of petitioners shows (Vol. II, p. 44) that for at least 15 years before 1937 the drainage district had been insolvent, dormant and inactive and that when the receiver was discharged in 1934 bonds of the district were selling at around five cents (5¢) on the dollar. Thus for many years prior to the taking in this condemnation suit the district had been utterly unable to supply any consideration for the drainage taxes levied against petitioners lands. In such circumstances there was *a complete failure of consideration* for those assessments. That in substance was one defense set up in the answers as above quoted.

The following authorities sustain that defense: *District of Columbia* v. *Thompson,* 281 U. S. 25, 74 L. Ed. 677, and cases annotated beginning 74 L. Ed., page 677; *Manley* v. *City of Marshfield,* 88 Ore. 482, 172 Pac. 488, 6th and 9th headnotes and supporting text; *Mayor, etc., of Baltimore* v. *Hettleman,* 37 Atl. 2d 335, 6th and 8th headnotes and supporting text; *Huey* v. *Board of Drainage Commissioners* (Ky.), 15 S. W. 2d 451; *Union Trust Company* v. *Carnhope Irr. Dist.* (Wash.), 232 Pac. 341, 1st and 5th headnotes; *Whitcher* v. *Bonneville Irr. Dist.* (Utah), 256 Pac. 785, 4th headnote and supporting text; *Smith* v.

Enterprise District (Oregon), 85 Pac. 2d 1021, 2d, 4th, 6th and 7th headnotes.

In *District of Columbia* v. *Thompson* the owner of property abutting on a proposed street after waiting 14 years for the improvement sued the district to recover special assessments he had previously paid. During that period the district had taken such action as to clearly show the abandonment of the project to improve that street. Said the court:

> "Under undisputed facts, we think the District was under an obligation imposed by law to return, *as for a failure of consideration*, the assessment of benefits that had been paid by the plaintiff." (Italics ours.)

If the plaintiff, in that case, had paid nothing during the 14 year period and the district had then sued to collect the assessments levied the case would have been substantially a parallel with the case at bar. And if that suit had been one by the district against the property owner to collect, undoubtedly the court would have recognized and sustained a defense of failure of consideration. Such a defense lasts as long as the claim lasts for obviously a property owner in such situation is under no obligation to take the initative and besides no taxing entity can claim any change of position to its own injury by reason of its own default.

The state cases cited above reached like results, where a city or other taxing district abandoned the whole or a substantial part of a proposed improvement project. The case of *Baltimore* v. *Hettleman* is instructive. There as in the *District of Columbia* case a proposed street improvement was abandoned and after a lapse of 13 years the property owner brought an action to cancel the assessment of benefits against his property which abutted on the proposed street improvement. The court held that he was entitled to cancellation on the theory that no consideration had been received. The city undertook to plead laches,

acquiescence and the like but the court answered that the property owner had no "power of prophecy," when the improvement was being proposed and ordered by the city to know that no such improvement would ever be made. The same is true of the petitioners.

The Kentucky case of *Huey* v. *Board of Drainage Commissioners* is another good illustration. In that case a part of a drainage scheme along a certain creek was abandoned and the plaintiff's property was along that creek and might have received benefits from the construction of that part of the project. Later it turned out that the drainage commissioners had abandoned that part of the project and left the plaintiff's property without benefit. The court held that the property owner was entitled to a cancellation of the drainage assessment and to have an injunction from levying further drainage assessments. Among other things the Kentucky court said:

> "It (District) should not abandon this part of the project in derogation of the rights of owners of lands adjudged to be benefited by such construction, and still force them to pay assessments on the main project."

There are a number of decisions by the Supreme Court of Florida which are in harmony with the above cases. In *City of Coral Gables* v. *State*, 129 Fla. 834, 177 So. 290, the court held as stated in the 1st headnote:

> "Property cannot be taxed for municipal purposes when such taxation would in effect deprive any person of property without due process of law or would take property without just compensation or would deny equal protection of laws."

In *State* v. *Town of Boca Raton*, 129 Fla. 673, 177 So. 293, the court held as stated in the 2nd headnote:

> "Where lands annexed by municipality were wild, unoccupied, unimproved lands, remote from municipality

> and receiving no benefits from municipality, annexation was illegal and could be questioned by landowner at any time."

In *Cosby* v. *Jumper Creek Drainage District*, 3 So. 2d 356, the drainage district under-took to enforce assessments against certain property after a delay of some 17 years. The property owner set up that a certain part of the drainage project might have given some benefit to his lands but that the district had failed to make that improvement. The court sustained that defense and quoted at length from the decision of this court in *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478, 60 L. Ed. 392. In *Smith* v. *City of Winter Haven*, 18 So. 2d 4, decided since the *Macclenny Turpentine Company* decision, the court held as stated in the 5th and 6th headnotes:

> "5. A taxpayer is not estopped from maintaining suit to enjoin future collection of unlawfully imposed tax by previous payment of such tax over a period of years."
>
> "6. Persons adversely affected thereby may raise the defense of laches, but it is not available to those who have been unjustly enriched thereby."

In the opinion the court among other things said:

> "When the relation between the taxes exacted and benefits conferred is not apparent, there is no basis whatever to sustain the tax."

The court further held that the city had been "unjustly enriched" by collecting previous assessments where no benefits had been conferred.

In the early case of *Wilkerson* v. *Leland*, 2 Peters 627, 7 L. Ed. 542, the court, speaking through Mr. Justice Story, said:

> "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred * * *. We

> know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

We submit that if the drainage district in this case is entitled to receive all of the awards made by the Federal jury after having abandoned the petitioners lands and left them without any improvements for more than 25 years, and after having become insolvent and unable to furnish any benefits to those lands, then there will be accomplished exactly what Mr. Justice Story says could not be accomplished.

It is unnecessary to go back to Mr. Justice Story's decision because in *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U. S. 165, 79 L. Ed. 1365, this court, in 1935, held as stated in the 3rd headnote (L. Ed.):

> "If the burden imposed by a municipal ordinance on a street railway company in assessing against it the cost of street paving is without any compensating advantage, an arbitrary abuse of power results, and the assessment amounts to confiscation."

Error No. 3: *The courts below severally erred in striking and holding for naught all those parts of the original answer and the amended answer of petitioners which set up sundry abandonments and radical changes in the plan of reclamation without any compliance with what are now Sections 298.07 and 298.27 Florida Statutes 1941, and without any compliance with due process requirements, followed by a continued use of the original assessment of benefits as a basis for levying installment and maintenance taxes.*

The matter of radical changes in the plan of reclamation is set out in Sections III, V, and VI of the amended answer

(Vol. II, pp. 36 to 43). Those sections of the amended answer adopted and reaverred Section VII of the original answer (Vol. I, pp. 118-127) and Section XI of the original answer (Vol. I, pp. 141-151), and Section XXI of the original answer (Vol. I, pp. 151-163).

The petitioners in the *Cecil Field* case, known in the Court of Appeals as case No. 11347, were primarily affected by the total abandonments as discussed under Error No. 2 above. Nevertheless these petitioners, in that particular case, were indirectly affected by radical changes made in other areas, because after the changes and abandonments the supervisors continued, year after year, to spread the burdens of taxation on their lands which should have been borne, if at all, by lands in other areas which actually did receive some degree of benefit.

The amended answer, found Volume II, and sundry other papers filed thereafter, including the hearing before the Court of Appeals, included four other cases not brought up with the record in case No. 11347. Nevertheless the record actually brought up also shows the effect of the radical changes and abandonments in other areas. Two of the other cases before the Court of Appeals, namely cases No. 11348 and No. 11355 involved about 9000 acres of land taken for a gunnery range lying north of the Cecil Field area embodied in case No. 11347 and south of the Seaboard Railroad, as shown on the map "Exhibit A" (Vol. I, p. 231). Both of those cases involved much larger holdings of Mrs. Bostwick and Jacksonville Heights Improvement Company than did case No. 11347. In addition those cases involved numerous other non-residents owning small 10 acre tracts similar to the McDermotts involved in case No. 11347 and who reside in California. It follows therefore that Error No. 3 is pertinent to the case of petitioners as applied to their lands in the Cecil Field area,

and likewise as applied to their lands in each of the other cases heard jointly by the Court of Appeals.

The changes in the plans of reclamation alleged in the original and amended answers must be considered in connection with the provisions of what are now Sections 298.07 and 298.27 Florida Statutes 1941, and in connection with the due process and equal protection clauses of the 14th Amendment.

THE SUPERVISORS UNDERTOOK TO AMEND THE DECREE CREATING THE DISTRICT AND TO AMEND THE PLANS OF RECLAMATION CONTRARY TO SECTION 298.07 FLORIDA STATUTES 1941 AND CONTRARY TO THE 14TH AMENDMENT.

Among the subjects which might be changed, pursuant to what is now Section 298.07 Florida Statutes 1941, was "to amend or change the plan of reclamation or the boundary of said district." The same Section further provided "If such petition asks the court's permission to change the plan of reclamation or that the boundary lines of such district be in any manner changed, it shall also ask the court to appoint three commissioners."

The commissioners so appointed are then to appraise and assess benefits on lands that may be annexed or affected by change in boundary lines, whereupon the notice to owners is then to be published in order that owners may be heard, after which a new Decree may be entered amending the plan of reclamation by changing the boundary lines or otherwise and if such Decree is entered, the commissioners are then to make a re-assessment of benefits in the same manner as when the District was originally created.

Sections VII and XII of the original answer, above cited, made it clear that the supervisors undertook in substance to greatly contract the boundaries of the District and to exclude many sections and parts of sections from the District for all purposes, except for the purpose of taxation, and that they did this without any petition to the Court,

without any authority from the Court, without any re-assessment of benefits and without any notice to property owners and without any pretense of complying with what is now Section 298.07 Florida Statutes 1941.

We have heretofore pointed out that the three revised maps for each of the three townships of the District were approved by resolution of the supervisors on February 18, 1918, and on April 2nd, 1918, thereafter they entered into a new construction contract using said revised maps as the basis of said contract (Vol. I, p. 145). If attention be now had to those three maps so adopted long prior to the second bond issue and even longer prior to the third bond issue, it is readily apparent that the supervisors did clearly violate what is now Section 298.07, Florida Statutes 1941. The legend on the left-hand margin of the map, Exhibit "C", explains that the short ditches originally proposed for Sections 4, 5 and 6 were to be entirely omitted, ⅔ of the ditch in Section 3 omitted. The map drawn by Simons in 1928 in connection with his report, Exhibit "G", shows that the ditch in Section 19 was entirely omitted. The revised map, Exhibit "D", shows by its legend that proposed ditches, namely, D-5 and D-6 in Sections 1 and 2, were entirely omitted, likewise proposed ditch D-2 in Sections 23 and 24 was entirely omitted. Also that the long ditch through Sections 30 to 25 was entirely omitted, also that the ditch for Section 33 and southwest part of 34 was entirely omitted. The revised map, Exhibit "E", shows that ditch H in the southwest corner of the township was omitted and that proposed ditch E-1 in Section 33 was omitted. Also that many other ditches were shifted and greatly reduced in size so that there was a reduction in cubic yardage from 547,902 cubic yards to 339,720 cubic yards—almost half.

The total elimination of the various entire sections, in the northeast corner, the northwest corner, the southwest corner, and in other parts of the District, amounted to the

same thing as contracting the boundaries of the District, because all of those entire sections were, by the changes attempted, entirely excluded from all drainage benefits proposed by the original plan of reclamation, which original plan was the basis of the original assessments of benefits made by the commissioners, reported to the Court and confirmed October 4, 1916. Yet on the showing made by the answers of the appellants, the commissioners proceeded without any petition to the Court, without any order of the Court and without any notice to the property owners and without giving the property owners in the excluded sections or other parts of the District, any opportunity whatsoever to be heard.

THE SUPERVISORS ALSO VIOLATED WHAT IS NOW SECTION 298.27 FLORIDA STATUTES 1941 AND THE 14TH AMENDMENT, IN THAT THEY UNDERTOOK TO AMEND THE PLANS OF RECLAMATION BY PROVIDING FOR NEW CANALS AND OTHER WORKS, ADDITIONAL BONDS AND ADDITIONAL TAXES WITHOUT ANY APPLICATION TO THE COURT, WITHOUT ANY NOTICE TO THE PROPERTY OWNERS, WITHOUT ANY RE-ASSESSMENT OF BENEFITS AND WITHOUT ANY APPROVAL THEREFOR FROM THE COURT.

The first sentence of Section 298.27, Florida Statutes 1941, provides that where the works or the original plan is found insufficient, the supervisors may formulate

> "New or amended plans, containing new canals, ditches, levees or other works."

The statute then provides that additional assessments may be made

> "in proportion to the increased benefits accruing to the lands because of the additional works."

The statute, however, provided that the new assessments were to be made by commissioners, appointed by the Court, who would act under the provisions of what is now Section

298.32 Florida Statutes 1941. The third sentence of the Section dealing with the same subject, provides that if the original plan of reclamation required modification by

> "enlarging or improving the other works authorized by the plan of reclamation, *or construction of additional canal, ditches or levees.*" (Italics ours.)

and the total tax originally levied under what is now Section 298.36 was insufficient

> "to carry out the plan of reclamation *with such modification.*" (Italics ours.)

then the Board of Supervisors were to file a petition with the Court organizing the District, praying for permission to change the plan of reclamation.

Sections VII and XII of the original answer of appellants show that the kind of changes in the plan of reclamation contemplated by this section of the law were attempted without any petition to the Court or any authority from the Court.

As we have seen, looking at the map, Exhibit "E", for Township 3, S. R. 24 E, there was a shifting of practically every proposed ditch or canal. This is readily seen by comparison of the dotted lines with the solid lines on the map and there was also a decrease in cubic yardage of nearly one-half. In addition, that which was proposed by Exhibit "E" was never actually carried out for as we have shown, the proposed floodways were never cut and opened and practically the entire southwest half of that township was left without any drainage improvements whatsoever. The changes attempted for township 2, S. R. 24 E, as shown on the map, Exhibit "D", were even greater. The long dotted lines through Sections 30 to 25 was original ditch D and was to carry water eastward into McGirt's Creek at the east edge of the District. That

ditch was entirely abandoned. So was the ditch to carry water out of Section 33 and in lieu of those two ditches a new ditch or canal, designated as D-7, was to carry water northward to meet two arms of Ditch D-1, one arm bringing water eastward from Section 30, the other arm bringing water westward from Section 27, thence northward through a new ditch, designated "C" under the Seaboard Railway to join ditch C-4, thence northward along the "C" channel to a proposed northern outlet on the north edge of the District in Section 6. Thus there was an entirely new plan for at least five sections of land south of the Seaboard Railroad, that is to say, to carry water north from the five sections, rather than eastward. That change becomes very material, because Case No. 11348 (D. C. 481) and Case No. 11355 (D. C. 527) took all of that area from the center of the Sections 29 and 32, south of the Seaboard and eastward into Sections 23, 26 and 35. The appellants I. Otto Brown, Nellie C. Bostwick, Jacksonville Heights Improvement Company and all other appellants in D. C. No. 481, and D. C. No. 527, were directly affected by the new plans and changes under discussion, because they owned lands along the proposed, but abandoned, ditches.

Without further analysis, it is perfectly clear that the adoption of such a new plan of drainage and the changes in the locations of canal, in the size of canals and in the construction of new canals to effect the changed plan of reclamation, all brought the situation within the purview of what is now Section 298.27, Florida Statutes 1941. Nevertheless, the supervisors didn't make any pretense of filing any petition with the Court for authority to make such changes, they procured no order in that behalf, no notice was published to property owners, no reassessment of benefits were made and no court order was made approving such reassessed benefits.

Further parts of Section 298.27 show without any doubt that what the supervisors undertook to do was clearly illegal and void. That Section further provides:

> "*After* the lists of land with the assessed benefits (meaning the re-assessment of benefits) and the decree and judgment of the court have been filed in the office of the clerk of the circuit court as provided in Section 298.34, then the Board shall have power to levy an *additional tax* * * * to pay increased cost of the completion of the proposed works and improvements as shown in said plan of reclamation *as amended.*" (Italics ours.)

Under this part of the statute, no "additional tax" could be levied to pay the increased cost of completing the work under the revised plans until and unless Court authority has been obtained, commissioners appointed, reassessments made and approved by the Court. Those were all conditions precedent to the levy of any "additional tax"—none was ever fulfilled. The same section then further provides:

> "And if in their judgment it seems best to issue bonds not to exceed the amount of said additional levy."

This language shows very clearly that bonds could not legally be issued unless there had been a legal "additional tax" levy after compliance with conditions precedent, above mentioned. The result is that the entire second and third bond issues involved in this case were utterly void and all additional taxes levied in consequence thereof were void. Neither the second bond issue nor the third bond issue was ever validated and, therefore, there can be no argument as to whether this point can now be considered.

The showing made by the original answer adopted by the appellants is further reinforced by the averments contained in Section II of the amended answers (Vol. II, pp. 36-38). It is there specifically pointed out that the doings of the supervisors prevented property owners from having any hearing and prevented them from having any means of knowing what the supervisors had done. The Statute undertook to secure to property owners due process of law by specifically requiring published notices and hearings, but none was had. Property owners were left in the dark. Resident property owners had no opportunity to know the extent of the changes or the materiality thereof, much less non-residents, such as the owners of the McDermott tracts, living in the State of California. It follows, therefore, without citation of any authority, that the continued use of the old assessments of benefits reported in August, 1916, and approved in October, 1916, after all of the eliminations and changes, above shown, operated to take the properties of these appellants severally without due process of law and without equal protection of the laws. This violation of Federal rights is specifically charged in Sections III and VI of the amended answers, but was not charged in the *Macclenny Turpentine Company* case, therefore, not passed upon by the Florida Supreme Court.

Many cases distinctly hold that where material changes and amendments have been made to the plan of reclamation new authority must be obtained from the court or from the body having authority, new notices to property owners and a new basis of benefits arrived at before new taxes can be justly imposed. Examples of such holdings are *Duncan* v. *St. Johns Levee & D. Dist.* (8 C. C. A.), 69 Fed. 2d 342; *McCreight* v. *Central Drainage Dist.* (Miss.), 102 So. 276; *Armistead* v. *Southworth* (Miss.),

104 So. 94, 1st and 2nd headnotes and supporting text; *Thomas* v. *Dallas County Levee Imp. Dist.* (Tex.), 23 S. W. 2d 325, 2rd headnote and supporting text; *Kelleher* v. *Joint Drainage Dist.* (Iowa), 249 N. W. 401; 28 C. J. S. 342, notes 30, 31 and 32; 28 C. J. S. 378-9, notes 68 and 75; 28 C. J. S. 458, note 78; *State* v. *Missouri Valley Drainage Dist.*, 185 S. W. 2d 800, 8th headnote, decided by the Supreme Court of Missouri March 5, 1945; *Ecker* v. *Southwest Tampa Storm Sewer D. Dist.*, 75 Fed. 2d 780.

In addition the want of notice to property owners and want of any hearing on proposed reassessments were likewise fatal—because the right to notice and hearing were secured by the 14th Amendment. *Browning* v. *Hooper*, 269 U. S. 396, 70 L. Ed. 330, 6th N; *Londoner* v. *Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112; *Redman* v. *Kyle*, 76 Fla. 79, 80 So. 300; *Cooley's Constitutional Limitations*, 8th Ed., notes page 1065.

The case of *Hagar* v. *Reclamatoin Dist. No. 108*, 111 U. S. 701, 28 L. Ed. 569, is material in two aspects of the argument made in support of Error No. 3. In that case, 111 U. S. text 706, the court laid down this rule in a reclamation case supported by special assessments the same as in this case:

> "The rule, that he who reaps the benefit should bear the burden, must in such cases be applied."

The non-application of that rule is the basis of these petitioners' complaint. In the latter part of the *Hagar* decision, 111 U. S., text 711, it was further pointed out that under the law of California pertaining to the reclamation of swamp lands assessments for such purposes could be enforced

> "Only by suits and, of course, to their validity it is essential that notice be given to the taxpayer and

> opportunity be afforded him to be heard respecting the assessment."

The court then added that,

> "If property, taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, * * * these words * * * can have no definite meaning."

But in the case at bar the courts below absolutely denied any such right to the petitioners by striking out and holding for naught their original answer and amended answer.

It may be contended by counsel for respondent that the matter of abandonment as herein complained of and the matter of radical changes as herein complained of have heretofore been before the courts and have been disposed of adversely to our contentions. The case of *Duval Cattle Company* v. *Edward S. Hemphill, as Receiver for Baldwin Drainage District,* reported 41 Fed. 2d, 443, may be cited in connection with such contention, if so, the contention is unsound. It is true that the answer filed by the Duval Cattle Company in that tax foreclosure case asserted as a conclusion that the official plan of reclamation had been changed in material particulars, but only about 10 lines of the answer were devoted to that subject and the answer did not show what the changes were or how, if at all, they affected the lands of Duval Cattle Company involved in that case. Nothing whatsoever was asserted in the answer of Duval Cattle Company with respect to abandonment, therefore the lame effort to assert material changes was wholly insufficient from the standpoint of pleading and besides the principal defense relied upon by the Duval Cattle Company was a plea of payment and that failed for reasons stated in the opinion of the Court of Appeals. The plea of payment itself was inconsistent with any other defense.

Opposing counsel may contend that the Supreme Court of Florida had the same matter before it in the *Macclenny Turpentine Company* case. It is true that the bill of complaint in that case did complain of abandonments and changes in the plan of reclamation affecting the lands involved in that case, but as will be seen by the opinion of the Supreme Court of Florida, 18 So. 2, text 794, the 13th point listed by the court as grounds of attack on district proceedings did not mention any abandonments and nowhere in the opinion did the court mention, construe or apply what are now Sections 298.07 and 298.27, Florida Statutes 1941. Moreover as previously noted in the petition for certiorari and in this brief the plaintiffs in the *Macclenny Turpentine Company* case did not properly invoke the protection of the 14th Amendment and the majority opinion in that case did not undertake to pass upon any such constitutional question. It follows, therefore, that the petitioners in these cases were entitled to have their answers relating to the subject matters set forth in Error No. 3 considered on their merits. Both of the courts below refused so to do.

Error No. 4. *The courts below severally erred in striking all those parts of petitioners' answer which set up the arbitrary and capricious character of the original assessments of benefits used as a basis for levying drainage taxes against lands in abandoned areas and as basis for other areas affected by radical and unauthorized changes in the plan of reclamation.*

This matter was covered by Section III of petitioners' amended answer Vol. II pages 36 to 39. The attack is not upon the assessment of benefits confirmed by the Circuit Court on October 4, 1916, as applied to the plan of reclamation which had been previously adopted and used by the

commissioner as a basis for their assessments. What the petitioners complain of is the continued use of those assessments of benefits as a basis for levying taxes *subsequent to the numerous abandonments and radical changes in the plan of reclamation.* The contention is that the old assessment of benefits, as applied to the changed status, were entirely arbitrary and capricious and that when the supervisors themselves abandoned about one-fourth (¼th) of the entire area in the district and made radical changes in the remainder they, in effect, vacated and nullified the original assessment of benefits to such an extent that the order of confirmation made on October 4, 1916, was no longer effective to prevent a consideration of the arbitrary and capricious character of the assessments as applied to the new status created by the supervisors themselves.

As previously pointed out the Supreme Court of Florida did not in the *Macclenny Turpentine Company* case consider any such matter nor did the court consider or apply what are now Sections 298.07 and 298.27 Florida Statutes 1941. Neither has the Supreme Court of the State in any other case construed or interpreted those sections of the drainage law. Therefore it was necessary for the lower Federal courts to assume that responsibility. In the case of *Markham* v. *Allen*, decided by this Court January 7, 1946, and now reported 90 L. Ed. (Adv.) 254, 257, it was stated:

> "The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner."

In the absence of any interpretations by the Supreme Court of Florida we may find instructive the decisions of the Supreme Court of Missouri construing the drainage law of that state from which the Florida drainage law, Chapter 6458, Laws of Florida 1913, was adopted and

literally copied. In the case of *Mound City Land & Stock Co.* v. *Miller,* 170 Mo. 240, 70 S. W. 721, 60 L. R. A. 190, 94 Am. St. Rep. 727, the Supreme Court of Missouri, construing the drainage law of that state as then existing, said:

> "The power to levy an assessment upon the lands in question is not to be understood as a power to tax in the ordinary meaning of that term. It is the power to compel the payment of a sum limited by the terms of the law *as a compensation for a direct benefit conferred.*" (Italics ours.)

In a prior part of the same opinion the Missouri Supreme Court also adopted the language of Mr. Justice Field in *Hagar* v. *Reclamation Dist.,* No. 108, *supra,* to the effect,

> "That he who reaps the benefit should bear the burden."

In *Pinellas Park Drain. Dist.* v. *Kessler,* 69 Fla. 558, 68 So. 668, the Supreme Court of Florida when generally upholding the constitutionality of the Florida Drainage Act of 1913 cited, with approval, the decision of the Supreme Court of Missouri in the *Miller* case, *supra.* Thus the Florida Supreme Court conceded that the general drainage scheme, as defined by the Missouri Court in the *Miller* case, had been brought over and adopted in Florida by the enactment of Chapter 6458, Laws of Florida 1913.

We can pass next to two very late decisions of the Missouri court dealing with the Missouri amended drainage law approved March 24, 1913 and appearing in Missouri Laws of that year pages 232 to 267. The amended Missouri law was virtually copied by Chapter 6458, Laws of 1913, approved June 9, 1913. In the case of *Jacoby* v. *Missouri Valley Drain. Dist.,* 163 S. W. 2d 930, it appeared that the district had been organized under the Missouri Statute of 1913. Jacoby had been appointed chief engineer and after

completing his work commissioners were appointed to assess benefits, which were reported to the Court and confirmed. The preliminary levy of 50¢ per acre had been exhausted wtihout completely paying the engineer's expenses and other expenses incurred. In the meantime the Federal government, by purchase and condemnation, acquired a little more than 25% of the area as a game preserve. Jacoby got a judgment against the district for the remainder of the compensation and his assignee then brought a mandamus suit against the district reported as *State* v. *Missouri Valley Drain. Dist.*, 185 S. W. 2d 800. In the mandamus case the assigne of Jacoby undertook to compel the levy of an additional tax to pay off the judgment. In the mandamus case the Supreme Court of Missouri first pointed out:

> "A tax may not be levied unless expressly authorized by statute."

also that,

> "When authorized, a tax may be levied only within the terms of the statute."

The court thereupon denied the writ and the reason for such holding was stated in the 8th and 9th headnotes, reading as follows:

> "Where action of federal government in condemning part of area of drainage district made it impossible to carry out approved reclamation plan, the district could legally proceed with a new plan, but such action would require a new assessment of benefits based on new plan. Mo. R. S. A., 12324 et seq.
>
> • • • • • • •
>
> "Judgment against drainage district on warrants for engineer's services in preparing reclamation plan which had been approved, but which could not be carried out because federal government had condemned part of

> area of district, could not be paid out of a levy made on basis of benefit assessments under an abandoned reclamation plan. Mo. R. S. A., 12324 et seq."

In the Opinion, 185 SW, 2d, text 803, Mr. Justice Hyde explained the basis of the holding represented by the 8th and 9th headnotes, as follows:

> "I do not think that relator's judgment can now be paid out of a levy on the basis of the present benefit assessments because these benefits are based on a plan of reclamation which it is impossible to use and which had to be abandoned. When that plan was made useless before anything was done under it, were not also the benefits assessed under it made uncollectable? Were not these benefit assessments necessarily abandoned with the abandonment of the plan? They were assessed only on the basis of its use, Sec. 12336 so provides. All references are to R. S., 1939, and Mo. R. S. A. This drainage article, Art. I, Chap. 79, contemplates that all payments for the costs of any plan of reclamation shall be in proportion to the benefits each landowner would derive from its completion. Now when it is conceded that work under this plan is impossible and that none can ever be commenced under it, it does not seem to me that payment of any part of the estimated benefits (from its completion) should now be required by mandamus."

Section 12336 of the Missouri Statutes cited in this quotation is the same as Section 13 of Chapter 6458, Laws of Florida 1913 and the same as what is now Section 298.32 Florida Statutes 1941. It follows therefore that the quotation, last above, is a construction by the Missouri Supreme Court to the effect that if there has been an abandonment in material respects of the plan of reclamation then no tax can be subsequently levied if based upon the original assessment of benefits. In the case at bar the supervisors of the district by their own acts deliberately abandoned about 25%

of the district and by their own acts undertook to radically change the plan of reclamation for other lands, but without new court authority, without any notice to property owners and without any reassessment of benefits. Under the analysis made by the Supreme Court of Missouri the original assessments of benefits were abandoned along with the abandonment of the original plan of reclamation and the supervisors, for reasons set forth by Mr. Justice Hyde, had no power to use such assessment of benefits as a basis for levying either installment taxes or maintenance taxes even if such assessment of benefits had not been arbitrary and capricious as applied to the original plan of reclamation.

Since there was never any court confirmation of the assessment of benefits as applied to the new status created by the abandonments and radical changes, we are, therefore, justified in making a new examination of the assessment of benefits, reported by the commissioners in August 1916, to ascertain if they were arbitrary and capricious in the first instance or whether they have such character as applied to the new status which the supervisors themselves undertook to create.

The capricious and arbitrary character of the assessments of benefits was initially shown by Section VII of the original answer particularly (Vol. I, p. 122 to 126). The same thing was reaverred and reinforced by Section III of the amended answer (Vol. II, p. 37). Exhibit "A" to the original answer (Vol. I, p. 231) also is material to the same inquiry. The figures marked on the several parcels of land in the Cecil Field area of that map represent the total of the reported assessments of benefits against each parcel. For instance, the commissioners in August 1916, reported total benefits of $300.00 on each of the four lots belonging to P. F. McDermott, that is to say lots 3, 4, 5, and 6, in the northeast corner of Section 26, which made the reported special benefits to accrue to those lots, from the

proposed plan of reclamation, $30.00 per acre. The same report showed that the basic value of the land, when taken for canal purposes, was $4.00 per acre, and in this case the Federal condemnation jury found the same land to have a value of $5.00 per acre. Exhibit "E" to the original answer shows that nothing was ever proposed for that particular average except to clear and grub the stream flowing southward through the edge of sections 23 and 26 but the floodway was never opened. Hence the McDermott lots were left charged with a supposed benefit of $30.00 per acre but entirely abandoned without any drainage improvements whatsoever. To further illustrate, two of the 40 acre tracts belonging to Mrs. Bostwick lay in the south half of Section 27 and were crossed by Sal Taylor Creek, as appears on the Map Exhibit "A" (Vol. I, p. 231). One of those 40 acre tracts was assessed with benefits at $1475.-00, the other at $1575.00. The one last mentioned rated at nearly $40.00 per acre for supposed benefits. These two 40 acre tracts were in the swamp of that creek and the assessments were arbitrary to begin with. Whereas, after the abandonments heretofore shown, those two 40 acre tracts instead of receiving any benefit whatsoever, were actually damaged by excess water being discharged into the upper branches of that creek. Yet, year after year, the supervisors continued to use that original assessment of benefits as a sort of ad valorem basis upon which to levy 15 mills per annum for installment taxes and 3 mills per annum for maintenance taxes. In 48 Am. Jur., Subject "Special or Local Assessments", Section 21, page 580, we find the following well stated proposition:

> "The rule is that a special or local assessment is justified and authorized by, and is unconstitutional and invalid without, a special benefit to the property assessed, resulting from a special or local public improvement.

> The assessment is regarded as compensation for such special benefit."

The text is supported by decisions from this court and practically every state court in the Union.

If such a yard-stick is used in this case there is no possible justification for the taxes levied and sought to be collected out of the awards made by the Federal jury in this case. In the amended answer of petitioners (Vol. II, p. 42) it is specifically charged:

> "That the application which said supervisors undertook to make of said drainage law operated to take the properties of these defendants and their predecessors in title without due process of law and without equal protection of the laws, contrary to the 14th Amendment to the Federal Constitution."

In 25 R. C. L., Subject "Special or Local Assessments", Section 13, p. 98, it is said:

> "The constitutional prohibition against taking private property for public use without compensation is only avoided when there is compensation by an equivalent of benefits. * * * But when the benefit ceases to be an equivalent for the assessment it become pro tanto a taking of private property for public use without just compensation, and therefore unconstitutional."

Without an authorized and confirmed reassessment of benefits the supervisors had no power or jurisdiction to make further levies of installment or maintenance taxes. See *Duncan* case and other cases cited page 55 *supra*. No doctrine of estoppel can supply such want of power or jurisdiction, *Ocean Beach Heights* v. *Brown-Crummer Investment Co.*, 302 U. S. 614, 48 Am. Jur., Subject "Special or Local Assessments" Section 296, p. 782.

Error No. 5. *The courts below severally erred in striking and holding for naught all of those parts of the original*

answer and the amended answer of petitioners which set up the levying of pretended maintenance taxes from 1924 to 1941, inclusive, on lands in abandoned areas where there was nothing to maintain and on other areas where there was no maintenance and during a period when the district was wholly insolvent and wholly unable to furnish any consideration for such levies.

The attack on maintenance taxes is made by Section X of the original answer (Vol. I, p. 134-141). That attack is reaverred and reinforced by Section IV of the amended answer (Vol. II, pp. 39-40). Maintenance taxes began in the year 1924 after the district was insolvent (Vol. II, p. 44), and after a receiver was appointed (Vol. I, p. 145). The receiver reported to the District Court on September 2, 1931, (Vol. I, p. 138) that there had never been any maintenance. The Simons report (Vol. I, p. 139) copy of which is attached to the original answer as Exhibit "G", showed that there had never been any maintenance up to 1928. Instead there was pure abandonment and flooding of areas including petitioners' lands. Nevertheless the supervisors levied from 1924 to 1930, inclusive, 4 mills on the $30.00 per acre assessment against the McDermotts lots or 12¢ per acre per year for pretended maintenance, and from 1931 to 1941, inclusive, they levied 3 mills or 9¢ per acre per year for pretended maintenance taxes. Against Mrs. Bostwick's two 40's in Section 27, appearing on the map (Vol. I, p. 231), they levied from 1924 to 1930, inclusive, approximately 16¢ per acre per year and from 1931 to 1941, inclusive, they levied approximately 12¢ per acre per year for pretended maintenance taxes. To make such levies for pretended maintenance taxes when there was never any original construction in that whole area—nothing to maintain—was nothing short of

"robbery under the color of a better name."

25 R. C. L., page 141, note 7. In the case of *A. C. L.* v. *City of Winter Haven,* 114 Fla. XXV, 151 So. 321, 324, the Supreme Court of Florida announced the same rule,

> "It is also equally well recognized that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution, and become extortion and confiscation, in which cases it then becomes the duty of the courts to protect the person or corporation assessed from robbery under color of a better name. Allen v. Drew, 44 Vt. 174; Sands v. City of Richmond, 31 Grat. (72 Va.) 571, 31 Am. Rep. 742; Broadway Baptist Church v. McAtee, 8 Bush (Ky) 508, 8 Am. Rep. 480; King v. City of Portland."

Under the facts alleged in petitioners' answers the maintenance taxes under attack were void *ab initio.* The passage of time could not make them valid. It has been repeatedly announced by the Supreme Court of Florida and many other courts that neither laches nor estoppel can be raised against an act such as a tax levy or a special assessment levy which was void *ab initio.* See *Combes* v. *City of Coral Gables,* 124 Fla. 374, 168 So. 524, 3rd headnote; *State Board of Administration* v. *Pasco County,* 22 So. 2d 387, 11th headnote and text supporting the same. Moreover any previous payment of maintenance taxes, such as made by the McDermotts with respect to their lots, could not constitute any basis for estoppel, on the contrary such payment constituted an "unjust enrichment" of the drainage district. *District of Columbia* v. *Thompson,* 281 U. S. 25, 74 L. Ed. 677, —— supra; *Smith* v. *City of Winter Haven,* 18 So. 2d 4. It is also well pointed out in Gray's Limitations of Taxing Power, Section 1999-b, p. 1022, citing and quoting the decision of this court in *O'Brien* v. *Wheelock,* 184 U. S. 450, and other authorities, that where the landowners did not receive the full benefit

of the improvement which was contemplated, there was a partial failure of consideration and that since the consideration was indivisible no part of the special assessment could be enforced. In the *O'Brien* case there was a failure to maintain, after some original construction. Here in abandoned areas there was never anything to be maintained.

Error No. 6. *The Court of Appeals erred in its application of the doctrine of estoppel to the facts alleged in petitioners' answers and admitted by the District's motion to strike.*

In the last reason assigned in the petition, for granting the writ of certiorari, we pointed out that in our view the Court of Appeals misapplied the decisions of this Court in the case of *Shepard* v. *Barron,* 194 U. S. 553, 48 L. Ed. 1115, and in *Utley* v. *City of St. Petersburg,* 292 U. S. 106. We set forth what was involved in those two cases and pointed out reasons why we think they were misapplied. That part of the petition for certiorari is adopted as a part of our brief in support of Error No. 6 above stated.

Relying upon such cases the Court of Appeals apparently overlooked many pertinent matters alleged in the answers of petitioners which were admitted by the attacking motions of the drainage district. For instance the courts below overlooked what was said about the status of the McDermott heirs in the original answer (Vol. I, pp. 86-87), particularly concerning their lack of knowledge as to what had happened in the affairs of the drainage district prior to the institution of this condemnation suit. Again it is specifically alleged in Section III of the amended answer (Vol. II, last half of p. 38 and top of p. 39) that the petitioners:

> "Had no opportunity or means of finding out what the engineers of the district and the supervisors

> thereof had undertaken to do with respect to the changes in the plans of reclamation and the original decree, as more particularly hereinafter shown. On the contrary, the supervisors kept all such matters secret from the property owners and in addition made new cost plus contracts for further drainage improvements, all without any competitive bidding, which said new contracts were predicated upon said changed plans. That the property owners then and at that time of the taking as well as other property owners who became such by mesne conveyances and by tax deeds, had no means of knowing what the supervisors had done in that behalf until the facts, after diligent search were dug up by counsel for these defendants during the period of several months prior to the institution of said Macclenny Turpentine suit in the State Courts."

Again it is alleged in Section VIII (Vol. II, p. 43 to 44) that the position of the drainage district and its bondholders,

> "Has never been changed to the injury by any act or omission to act on the part of this defendants severally. * * * That these defendants and their predecessors in title relied upon said supervisors to obey the law as declared by the General Drainage Statute and as required by the provisions of the 14th Amendment to the Federal Constitution."

In taking that position the petitioners are well supported by the case of *People* v. *LeTempt,* 272 Ill. 586, 112 N. E. 335, 9 A. L. R. 835, holding in effect that even property owners who petitioned for the formation of a drainage district had the right to assume that those placed in authority would obey the law and such property owners were not required to be constantly on watch for violations. The remainder of Section VIII of the amended answer (Vol. II, p. 44) further shows that the drainage district had been utterly insolvent for at least 20 years before this con-

demnation suit was instituted, that it had gone through a 10 year receiver-ship period after which its bonds were being bartered in the public at around 5¢ on the dollar. Moreover the record also shows that the drainage district quit all pretense of making drainage improvements in September 1920, and prior to that time, during 1918, it had adopted revised plans of reclamation providing for the complete abandonment of at least one-fourth (¼th) of the entire area of the district, and made radical changes in the remainder as already explained. After all work was suspended in September 1920, not another "lick" was ever done by way of construction or maintenance. Since the district was itself in default as to original construction and as to maintenance and thereafter became utterly insolvent and unable to perform it was never in position to complain of apparent acquiescence or inaction on the part of property owners.

In 27 R. C. L., Subject "Waiver", Section 5, page 908, 909, the following general rules applicable to acquiescence and waiver are stated:

> "To constitute a waiver within the definitions already given, it is essential that there be an existing right, benefit, or advantage; a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights, unless such waiver is distinctly made, with full knowledge of the rights which he intends to waive; and the fact that he knows his rights, and intends to waive them, must plainly appear."

Many decisions of this Court and of other courts are cited in the notes supporting this text. In the same volume, page 910, this further rule is stated:

> "In accordance with the general rule as to the burden of proof, it devolves upon the party claiming a waiver to prove the facts on which he relies for such waiver.

> A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known."

In the case at bar the drainage district pleaded nothing on the subject of waiver, acquiescence or estoppel. Hence all the more reason why consideration of those subjects by the courts below was error. Again in 19 Am. Jur., Subject "Equity", Section 504, p. 349, it is said:

> "If the complainant had no knowledge of the facts giving rise to the cause of action, he cannot be charged with laches."

Decisions of this Court and of other courts are cited in Note 13 supporting this text.

In 19 Am. Jur., Subject "Estoppel", Section 88, p. 730, the following rule is stated:

> "It is essential to the existence of an equitable estoppel that the representation, whether consisting of words, acts, or omissions, of the party against whom the estoppel is asserted shall have been believed by the party claiming the benefit thereof and that he shall have relied thereon and been influenced and misled thereby."

Many decisions of this Court and other courts are cited in Notes 18, 19 and 20 supporting this text. Among them the case of *Bloomfield* v. *Charter Oak Nat. Bank,* 121 U. S. 121, is cited for the proposition that,

> "No estoppel in pais can be created except by conduct which the person setting up the estoppel has the right to, and does in fact, rely upon."

If this yardstick is applied to the drainage district in this case then it cannot get any comfort from the doctrine of estoppel, especially when it has pleaded none, and proven none.

As a corollary to the same proposition it is further stated in the same volume, Section 846, p. 732, that:

> "Not only the party claiming an estoppel have believed and relied upon the words or conduct of the other party, but also he must have been thereby induced to act, or to refrain from acting, in such a manner and to such an extent as to change his position or status from that which he would otherwise have occupied."

Again many decisions from this court and other courts are cited in the notes supporting this text. Again in the same volume, Section 85, p. 736, it is stated:

> "There can be no estoppel where there is no loss, injury, damage, or prejudice to the party claiming it."

In the case at bar the drainage district has not claimed any loss, injury, damage or prejudice, on the contrary the answers of petitioners show affirmatively that the district suffered no loss, injury, damage or prejudice by anything done or omitted by the petitioners or by those through whom they claim.

As a final authority on this subject we cite the case of *McKeon* v. *Council Bluffs,* 206 Iowa 556, 221 N. W. 351, 62 A. L. R. 1006. In that case the property in question had been separated from the city by a change in the channel of the river through a process of avulsion. The property owner, after a lapse of 50 years, brought an action to have his property excluded from the territory of the city and freed from tax burdens thereof. The city plead laches, acquiescence and estoppel but the court answered all those arguments and gave relief.

Conclusion

As previously noted under Error No. 1, page 9, of this brief, the Court of Appeals erred in first holding itself bound, under the theory of the *Erie Railroad* case, by the

decision of the Supreme Court of Florida in the *Macclenny Turpentine Company* case. The Court of Appeals and the District Court again erred in striking out all those parts of petitioners' answers setting up what is recited in Errors Nos. 2, 3, 4, and 5 respectively. Finally the Court of Appeals erred, in apparently trying to bolster its decision, by erroneously applying certain decisions of this Court on the subject of estoppel. When so doing, the Court of Appeals overlooked the undisputed showing made by the answers of petitioners and overlooked the fact that the drainage district had not plead or proven any acquiescence, waiver or estoppel.

It is now respectfully submitted that petition for writ of certiorari should be granted and that the judgment and decree of the Court below should be reversed.

Respectfully submitted.

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